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Supreme Court, U.S.
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No. 01-75

IN THE

Supreme Court of the United States

PATRICIA E. GENTALA AND ROBERT A. GENTALA,

Petitioners,

vs.

THE CITY OF TUCSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Tucson, Arizona, provides city services (sound, lighting, facilities, trash collection, etc.) free of charge to a broad range of community groups for events in city parks, but categorically excludes events with religious messages from eligibility for such free services. Petitioners, organizers of a National Day of Prayer event, brought a constitutional challenge to the city's religious exclusion policy, but a divided en banc Ninth Circuit rejected the challenge.

1. Did the Ninth Circuit err in holding, contrary to this Court's recent decision in *Good News Club v. Milford Central School*, 69 U.S.L.W. 4451 (U.S. June 11, 2001) (No. 99-2036), that a governmental body constitutionally may exclude speech from a limited public forum because of the religious nature of that speech?

2. Did the Ninth Circuit err in holding, in conflict with the D.C. Circuit, that the Establishment Clause of the First Amendment forbids a municipality from providing, on a neutral basis, in-kind services, such as lighting and trash collection, to a religious event in a public park?

3. Does the discriminatory denial of in-kind government services to a speaker solely because of that speaker's religious message violate the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as incorporated into the Fourteenth Amendment?

4. Should this Court summarily reverse the Ninth Circuit where that court upheld the categorical exclusion of private speakers with religious messages from a program of in-kind benefits for city park events?

PARTIES

The caption of the case lists all of the parties to the proceedings in the lower courts.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND POLICIES 2

STATEMENT OF THE CASE 2

Facts 2

1. The Tucson Civic Event Policy 2

2. Denial of the Gentalas' Application 6

Course of Proceedings 9

REASONS FOR GRANTING THE WRIT 14

I. *GOOD NEWS CLUB* DIRECTLY UNDERCUTS THE DECISION OF THE NINTH CIRCUIT 15

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT..... 18

A. The Free Speech Clause 18

B. The Free Exercise Clause 19

C. The Establishment Clause 20

III. THE DECISION BELOW IS INDEFENSIBLE IN LIGHT OF *GOOD NEWS CLUB*, *ROSENBERGER*, AND OTHER DECISIONS OF THIS COURT 22

A. The Ninth Circuit's Specious Distinction of *Rosenberger* 22

1. Source of revenue 22

2. Religious organizations 23

3. Participatory religious service 24

4. Discretionary decisionmaking 24

5. Fundraising 25

6. Visibility of city personnel and equipment 26

7. Encouragement as endorsement ... 26

B. The Ninth Circuit's Other Reasons for Denying Equal Access 27

IV. THE DECISION BELOW CREATES A SPLIT IN THE CIRCUITS 28

V. THE DECISION BELOW CREATES A DEVICE FOR EVADING AND NULLIFYING THE EQUAL ACCESS RIGHTS OF RELIGIOUS SPEAKERS 29

CONCLUSION 30

APPENDICES

A. En banc decision of U.S. Court of Appeals for the Ninth Circuit (Mar. 30, 2001) 1a

B. Order of U.S. District Court for the District of Arizona (Sept. 30, 1997) (dismissing action) 51a

C. Judgment of U.S. District Court for the District of Arizona (Oct. 1, 1997) 79a

D. Panel decision of U.S. Court of Appeals for the Ninth Circuit (Apr. 20, 2000) 80a

E. Order of U.S. Court of Appeals for the Ninth Circuit (Aug. 18, 2000) (granting rehearing en banc) 160a

F. U.S. Const. amends. I, XIV 161a

G. City of Tucson Civic Event Policy Statement and Evaluation Criteria (Oct. 8, 1992) 162a

TABLE OF AUTHORITIES

Page

Cases

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 21

Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) 16

Campbell v. St. Tammany Parish School Bd., 206 F.3d 482 (5th Cir. 2000), *vac'd*, 69 U.S.L.W. 3778 (U.S. June 18, 2001) (No. 00-1194) 16

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 18, 19, 26, 29

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 20

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996) 16

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) 25

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 19

Employment Division v. Smith, 494 U.S. 872 (1990) 19

Everson v. Board of Educ., 330 U.S. 1 (1947) 21

Gentala v. City of Tucson, 213 F.3d 1055
(9th Cir. 2000) 1, 10, 11, 12

Gentala v. City of Tucson, 222 F.3d 614
(9th Cir. 2000) (en banc) 1, 12

Gentala v. City of Tucson, 244 F.3d 1065
(9th Cir. 2001) (en banc) . . . . . 1, *passim*

Good News Club v. Milford Central School,
69 U.S.L.W. 4451 (U.S. June 11, 2001) . . . . . 1, *passim*

Good News/Good Sports Club v. School Dist. of Ladue,
28 F.3d 1501 (8th Cir. 1994) 16

*Lamb's Chapel v. Center Moriches Union Free
School Dist.*, 508 U.S. 384 (1993) 19, 24, 29

Lemon v. Kurtzman, 403 U.S. 602 (1971) 10, 12, 21

McDaniel v. Paty, 435 U.S. 618 (1978) 20, 21

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 25

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) 28, 29

*Rosenberger v. Rector and Visitors of Univ.
of Va.*, 515 U.S. 819 (1995) . . . . . 1, *passim*

Widmar v. Vincent, 454 U.S. 263 (1981) ..... 18, *passim*

Constitutional provisions and statutes

U.S. Const. amend. I ..... 2, *passim*

U.S. Const. amend. XIV 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 9

28 U.S.C. § 1343(a)(3) 9

42 U.S.C. § 1983 9

INTRODUCTION

In this case a city discriminatorily denied Patricia and Robert Gentala access to in-kind benefits (such as lighting and facilities) made available without charge to a broad range of community groups for events in city parks. The sole reason for this categorical discrimination was that the Gentalas' planned event -- the National Day of Prayer -- would have communicated a religious message. The Ninth Circuit's decision upholding the city's religious exclusion policy runs directly contrary to this Court's recent decision in *Good News Club v. Milford Central School*, 69 U.S.L.W. 4451 (U.S. June 11, 2001) (No. 99-2036), as well as *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and the other decisions in this Court's line of "equal access" precedents. Indeed, this Court in *Good News Club* cited the Ninth Circuit's en banc decision in the *Gentala* case as belonging to one side (the wrong side) of a conflict in the circuits, a conflict this Court undertook to resolve in *Good News Club*. 69 U.S.L.W. at 4453.

This Court should grant review and summarily reverse or, in the alternative, either vacate the decision below and remand for further consideration in light of *Good News Club*, or else simply grant plenary review.

DECISIONS BELOW

The en banc opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 244 F.3d 1065 (9th Cir. 2001) (App. A). The previous panel decision of the Ninth Circuit is reported at 213 F.3d 1055 (9th Cir. 2000) (App. D). The order granting en banc review is reported at 222 F.3d 614 (9th Cir. 2000) (en banc) (App. E). The remaining orders and opinions below are unreported.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit rendered its en banc decision on March 30, 2001. On June 4, 2001, Justice O'Connor extended the deadline for filing a petition for a writ of certiorari until July 12, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix F. The pertinent city policy is set forth in Appendix G.

STATEMENT OF THE CASE

Facts[1]

The City of Tucson authorizes the provision, free of charge, of basic city services -- lighting, trash collection, use of facilities like bandshells and stage equipment, etc. -- to nonprofit organizations holding events in public parks. The city, however, categorically denies such in-kind benefits -- and instead requires payment of fees -- for events with a religious message. The constitutionality of that categorical discrimination is at issue here.

1. The Tucson Civic Event Policy

Municipal parks in Tucson, Arizona, are open for use, by members of the public, for a wide range of expressive activities, including public rallies. Park users can obtain, for a fee, a variety of city services (facilities, equipment, and the labor of city workers) for their events. Park users must coordinate with the city regarding such services.

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[1]As the district court noted, App. 77a, the critical facts are undisputed.

Pursuant to a Civic Event Policy that the respondent City of Tucson has maintained since at least October of 1992, park users can apply for a waiver of city fees for most services. The Civic Event Policy declares that the Tucson Mayor and City Council encourage and support civic events that:

- Celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life;
- generate broad community appeal and participation;
- instill civic pride in the City, state or nation;
- contribute to tourism; or
- are identified as unique community events.

App. 162a. In furtherance of this policy, the Mayor and Council "annually authorize the provision of various City services to Civic Events, at no charge." *Id.*

The Civic Event Policy specifically forbids direct city funding of events, or even indirect funding by reimbursement of third-party contractors: "City support provided through the Civic Event process will not involve cash payments to events, or to contractors necessary to provide a requested service." App. 162a-163a. Instead, the City simply charges off against a Civic Event Fund those city services -- trash collection, facilities rental, fees for light and audio equipment -- which would otherwise have been billed to the event sponsors. Bilsens Aff. ¶ 8. Thus, "Civic Event allocations are a budgetary means of detailing" what is in effect a waiver of fees for services. App. 162a.

The Tucson city policy also limits the in-kind provision of services to those "typical" of park events:

> In-kind City services provided through the Civic Event Funding Process will be limited to typical event-related services (e.g., Parks event equipment, refuse containers, street sweeping). Non-typical services (e.g., transportation of event materials, on-site City staff to conduct parking lot control or other miscellaneous duties) will not be provided to events.

App. 164a.

To be eligible for free in-kind city services, events must be open to the public. App. 163a. Events must also be sponsored either by a nonprofit organization or by one or more individuals conducting the events on a nonprofit basis. *Id.*

The city uses evaluation criteria to review applications for in-kind services. In addition to examining the event sponsor's financial need and other sources of funding for the event, App. 166a, the city considers the following:

> **Purposes and Objectives**: The extent to which the event celebrates and commemorates the community's cultural and ethnic composition, or significant ethnic, cultural and historical national or local occurrences; or improves understanding and awareness of issues facing the community with the objective of improving the quality of life. As additional funds are available, other types of events will be considered for support, but sponsors of such events must demonstrate, through a description of the event and its goals and objectives, that the event is worthy of City support.
>
> **Community Interest**: The extent to which the event generates broad community appeal and participation. The scope of community appeal and participation will be determined by the projected event attendance (or actual attendance at the event's last occurrence), in comparison to

> similar information from other events requesting City support. However, special consideration will also be given to small first time events conducted by organizations with limited resources that are in special need of assistance in their initial efforts to establish an event.

App. 165a-166a.

For the 1994-95 fiscal year, the City of Tucson allocated over $65,000 worth of in-kind services, under its Civic Event Policy, for two dozen events including:

- Hispanic Cultural Arts Event
- Earthday Festival
- Miracle on 31st Street
- Gay Pride Picnic
- San Xavier Week Pow Wow
- Fiesta de Garibaldi
- St. Patrick's Day Parade and Festival

The city's Civic Event Subcommittee, which initially reviews applications,[2] recommended renewed provision of in-kind services in 1995-96 for all but one[3] of the events provided such services in the previous year.

Only one class of events is categorically excluded, under the Tucson Civic Event Policy, from eligibility for free in-kind services under the policy: "events held in direct support of

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[2]The full city council retains authority to review subcommittee action on applications for in-kind services, Bilsens Aff. ¶¶ 10-11, although subcommittee approval of smaller grants (those under $1,500) need not be referred to the full council, *id.* ¶ 10.

[3]The Sister Cities Fund Raiser was not recommended for renewal. In addition, one new event (Casa Car Show) was not approved, and one event rejected in 1995-96 (Humane Society Fun Day) was again rejected.

religious organizations." App. 163a. This categorical exclusion targets two kinds of events: fundraisers for religious organizations, and events with religious messages. Transcript of Hearing on Motion for Preliminary Injunction [Prel. Inj. Tr.] at 42-43 (D. Ariz. Aug. 8, 1997) (counsel for Tucson explaining the "two ways" an event can directly support religious organizations, in violation of the Civic Event Policy). The Tucson policy explicitly allows for in-kind city services to fundraising events for other nonprofits. App. 163a, 166a. Only fundraisers for *religious* organizations are automatically disqualified under the policy. Likewise, events with nonreligious messages are eligible for in-kind city services. App. 162a, 165a. Only events with *religious* messages are automatically disqualified under the policy.

2. Denial of the Gentalas' Application

On April 16, 1997, petitioner Patricia Gentala submitted an application for in-kind city services for the National Day of Prayer (NDP) to be held on May 1, 1997. App. 135a-159a. Mrs. Gentala applied on behalf of herself and as Chairperson and City Coordinator of the Tucson National Day of Prayer Committee (NDP Committee).[4]

In her application, Mrs. Gentala explained that the NDP event would be cosponsored by the NDP Committee and the Tucson Association of Evangelicals. App. 135a. The event would be free and open to the public. App. 139a. Mrs. Gentala described the planned event as follows:

> The event will be hosted by a local radio announcer. There will be a time of praise and worship led by both a youth

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[4]Mrs. Gentala's husband, petitioner Robert Gentala, was actively involved with his wife in the leadership of National Day of Prayer activities.

choir and an adult choir. Pastors from nine different churches will lead the participants in prayer for local, state and national issues including the following:

- Improved relationships between different segments of our society.
- National, state and local leaders and their specific prayer requests.
- Law enforcement and emergency services.
- Youth, families, neighborhoods and the homeless.
- Educators and schools.

Patriotism will be emphasized in the decorations and music.

App. 141a. Mrs. Gentala reported that some 700 people attended the last prior NDP event and that she anticipated 700-900 attendees at the upcoming NDP. App. 142a.

In her application, Mrs. Gentala requested the use of the bandshell stage and the use of sound and lighting equipment. App. 153a-154a. The fee waiver sought had a total value of $340. App. 142a, 153a-154a. Mrs. Gentala explained that it is "difficult for us to afford adequate sound equipment, lighting, and rental fees" and that in previous years the NDP suffered from an "inadequate stage and sound package." App. 144a.

The city issued permits for the NDP event at the city's Reid Park, in the bandshell area (Demeester Outdoor Performance Center). The city denied, however, Mrs. Gentala's request for in-kind services under the Civic Event Policy.

Mrs. Gentala's request for in-kind services went initially before the Civic Event Subcommittee of the Tucson City Council. On April 21, that subcommittee voted to reject the request. The subcommittee chairman stated that the request

was against city policy and "separation of church and state," adding, "We're not gonna get into prayer stuff."[5]

The NDP event went forward without the provision of free in-kind services, with some 1,000 people attending. The NDP Committee rented the band shell for $130, but could not afford the additional sound and lighting equipment desired.[6]

Mrs. Gentala and her husband, petitioner Robert Gentala, then brought the matter before the full city council. The Gentalas formally requested the city to reconsider its religious exclusion, under the Civic Event Policy, for future NDP events. At a council meeting, the Mayor stated that "the question of church and state is what we're talking about, and I think you understand that and that was why there was that type of rejection."[7] The city then sent a formal rejection letter explaining that the denial was "because the National Day of Prayer is an event that supports a religious organization."[8] As counsel for the city subsequently explained, the city rejected the application "in this case" because of the event's "religious message." Prel. Inj. Tr. at 43.

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[5]Verbatim Transcript of Civic Event Subcommittee meeting re: "National Day of Prayer" (Apr. 21, 1997).

[6]The NDP event depends exclusively upon donations. All receipts are used to defray costs of the event, with any remaining balance going to the next year's event. No funds collected go to support the NDP Committee itself or any other beneficiary. App. 142a-143a.

[7]Verbatim Transcript of Tucson City Council Meeting (excerpt) at 2-3 (May 12, 1997).

[8]Letter of Ieva Bilsens, Budget Analyst, Dep't of Budget & Research, City of Tucson, to Pat Gentala (May 13, 1997).

Course of Proceedings

Petitioners Patricia and Robert Gentala filed suit under 42 U.S.C. § 1983 in district court in Arizona, challenging the constitutionality of the Civic Event Policy on its face and as applied. The complaint asserted, *inter alia*, violations of the Free Speech, Establishment, and Free Exercise Clauses of the First Amendment and requested declaratory and injunctive relief. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3).

The district court consolidated the hearing on a preliminary injunction with the trial on the merits, denied preliminary and permanent injunctive relief, and dismissed the action. App. 77a.

In its opinion, the district court described the case as "illustrat[ing] the confusing intersection between the First Amendment's Speech Clause and Establishment Clause." App. 57a (footnote omitted). The district court recognized the problematic nature of the city's legal position:

> The City's sole basis for denial of Plaintiffs' application for funding is acknowledged to be the fact that the National Day of Prayer is a religious event, involving religious expression and directly supporting religious groups. Content-based restriction on speech is presumptively unconstitutional.

App. 59a-60a (citation omitted). The district court also admitted that "[t]he facts at hand appear similar to those in *Rosenberger* [*v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)]," App. 63a, in which this Court held unconstitutional the discriminatory exclusion of a religious publication from a state university program reimbursing printing costs for student publications.

Nevertheless, the district court distinguished *Rosenberger*. App. 63a-65a. The district court opined that the petitioners were seeking "tax dollars to support a religious event," App. 66a, and that the Establishment Clause barred such use of "general tax funds," App. 65a. Hence, compliance with the Establishment Clause supplied the compelling interest needed to justify the city's "content-based restriction on speech." App. 67a.

The district court concluded further that the city's policy of religious exclusion passed muster under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because the denial of in-kind services to events with religious messages did not express hostility to religion, have a primary effect of inhibiting religion, or foster excessive entanglement with religion. App. 69a-72a. Turning to the endorsement test, the district court noted that the city could "easily advertise that it does not endorse the National Day of Prayer or any event." App. 73a. Nevertheless, the district court found that the presence of city workers at the NDP event would convey a message of endorsement. App. 73a-74a. The court also found that because of the NDP's "implied message" endorsing "Judeo-Christian religion," city support "impermissibly tends to give the religious event the appearance of status in the political community," App. 75a.

Having concluded that the religious exclusion clause of the Civic Event Policy was constitutional, indeed constitutionally mandatory, the district court dismissed the suit. App. 77a.

Petitioners appealed, and a divided panel of the Ninth Circuit reversed. App. D.

Undertaking "to navigate carefully the shoal-infested channel between the Scylla of the First Amendment's Free Speech Clause and the Charybdis of the First Amendment's

Establishment Clause," 213 F.3d at 1060, the panel first observed that

> while the [NDP] event had a strong sectarian character, as a civic event capable of increasing the community's knowledge and understanding of critical issues as well as generating broad community interest, support and civic pride, the event fell within the scope of events for which the [Civic Event] Fund had been created.

Id. at 1061. Further,

> the record shows -- and the City has never contested -- that the application was denied due to the religious character of the event for which the Gentalas were seeking reimbursement.

Id. at 1063.

Applying forum analysis, the panel identified the relevant forum as the Civic Event Fund -- i.e., the program for provision of in-kind city services. *Id.* at 1061-62. The panel concluded that this Fund constituted a "limited public forum that has been opened to support the expressive activities of certain groups speaking about certain topics," *id.* at 1062.

Observing that the religious exclusion clause of the Civic Event Policy rendered certain events "absolutely ineligible" for in-kind benefits under the policy, *id.* at 1063, the panel held that "the Gentalas' application could not be denied merely because it would bring a religious perspective to an otherwise permissible conversation," *id.* at 1064.

> The Gentalas' application was rejected because of their view that the most relevant manner in which to address . . . important social concerns was through the expressive acts of worship, singing and prayer.

Id. at 1065. The panel found its conclusion bolstered by the city's having approved a Civic Event Policy application for the Las Posadas event, which reenacts the search of Mary and Joseph for lodging in Bethlehem prior to the birth of Jesus. *Id.* The city explained that it considered Las Posadas to be "art," not an event "to directly support a religious organization." *Id.* The panel found this distinction -- between religion as "art" and religion as "religion" -- perfectly illustrative of viewpoint discrimination:

> we conclude that distinguishing between those who speak about religion who are directly supporting a religious organization and those who speak about religion who are not will always require the City to discriminate on the basis of the speakers' viewpoint.

Id. at 1065-66.

The panel also concluded that the Establishment Clause did not require or justify the religious exclusion. 213 F.3d at 1066-67 (applying *Lemon* and endorsement tests). The panel explicitly rejected efforts to distinguish *Rosenberger*, 213 F.3d at 1067-70, noting that the "in-kind services made available" under the Civic Event Policy were not "direct money payments to an institution or group that is engaged in religious activity," *id.* at 1069 (internal quotation marks and citation omitted).

The panel concluded that the religious exclusion clause of the Civic Event Policy was unconstitutional on its face and as applied to the Gentalas. *Id.* at 1071. One judge dissented, viewing the case as dealing with constitutionally forbidden taxpayer-funded subsidies of a religious event. *Id.* at 1072-83 (Pregerson, J., dissenting).

At the behest of respondent, the Ninth Circuit granted rehearing en banc. App. E. The en banc court proceeded to

uphold Tucson's religious exclusion policy on the basis that the Establishment Clause required such an exclusion. App. A.

The en banc Ninth Circuit acknowledged that, under the Civic Event Policy, the city merely provides in-kind benefits, not direct monetary support, to event sponsors. 244 F.3d at 1069. The en banc court further acknowledged that "there were sufficient funds available that most non-profit groups sponsoring eligible events received funding if they asked for it," *id.*, and that the city was "providing in-kind services for a wide range of speakers," *id.* at 1073. The en banc court recognized as well that the *Rosenberger* case was "indeed quite similar to this one in many respects," *id.* at 1074.

Nevertheless, the en banc court concluded that the Establishment Clause required the categorical exclusion of religious speakers from the Civic Event program, *id.* at 1078, 1082, "even if the exclusion is viewpoint discriminatory," *id.* at 1073 n.12.

The en banc court devoted considerable effort to distinguishing *Rosenberger*, 244 F.3d at 1074-81, ultimately concluding that "significant factual differences" supported "Tucson's Establishment Clause justification for its religious organization exclusion," *id.* at 1078.

Turning to petitioner's Free Exercise claim, the en banc court held that the discriminatory exclusion of religious events from in-kind benefits had not "discernibly burdened" the Gentalas or denied them services "essential to survival in civil society," 244 F.3d at 1082.

Dissenting, Judge Fernandez perceived the Tucson religious exclusion clause as "outright discrimination," *id.* at 1082, "aimed directly at religious organizations as such," *id.* at 1084, in violation of the Free Exercise Clause.

> The City has done something very like denying police and fire protection to churches. It has allowed all other non-profit organizations (except those that it already subsidizes) to cross the threshold that gives them the possibility of participation in a fund which allows the use of city facilities and services at no additional cost, but it has excluded religious organizations from those benefits. It is as if the City charged religious organizations, and only religious organizations, when firemen or policemen came to their facilities, or for the repair of sidewalks, or for the use or cleaning of roadways. That cannot be and is not constitutional.

Id. at 1085. In a separate dissent, Judge Kleinfeld, joined by Judge Wardlaw, contended that the record was insufficient to decide the Establishment Clause question. *Id.* at 1086-88. Echoing Judge Fernandez, these dissenters noted that

> [m]aking religious groups pay for what everyone else gets for free is like charging the churches but no one else when they call for police or fire department assistance.

Id. at 1087 (footnote omitted).

REASONS FOR GRANTING THE WRIT

Petitioners do not contend that the city *must* afford them free in-kind support. But the *a priori* disqualification of the Gentalas from even entering the review process, based solely on the religious perspective of their message, is indefensible under this Court's precedents.

> More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995). This Court recently reaffirmed this well-settled jurisprudence in *Good News Club v. Milford Central School*, 69 U.S.L.W. 4451, 4455 (U.S. June 11, 2001) (No. 99-2036):

> [S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the grounds that the subject is discussed from a religious viewpoint.

Despite this Court's long line of cases protecting equal access for religious speech, however, the en banc Ninth Circuit held that the Establishment Clause *required* the discriminatory exclusion of petitioners' planned National Day of Prayer program from the provision of free city services *even if that exclusion was viewpoint-based.* 244 F.3d at 1073 n.12. This Court should summarily reverse or, in the alternative, either vacate the decision below and remand for further proceedings in light of *Good News*, or simply grant plenary review.

I. *GOOD NEWS CLUB* DIRECTLY UNDERCUTS THE DECISION OF THE NINTH CIRCUIT.

The recent decision of this Court in *Good News Club* repudiates the Ninth Circuit's decision below, warranting reversal in light of *Good News Club*.

First, this Court expressly repudiated the Ninth Circuit's ruling in the present case -- *Gentala* -- in *Good News Club*. This Court identified *Gentala* as being part of a conflict in the circuits, a conflict this Court undertook to resolve in *Good News Club*:

> There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare *Gentala v. Tucson*, 244 F.3d 1065 (CA9

> 2001 (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services); *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482 (CA5 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), cert. pending, No. 00-1194; *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (CA2 1997) (concluding that a ban on religious services and instruction in the limited public forum was constitutional), with *Church on the Rock v. Albuquerque*, 84 F.3d 1273 (CA10 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination); and *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501 (CA8 1994) (holding unconstitutional a school use policy that prohibited Good News Club from meeting during times when the Boy Scouts could meet). We granted certiorari to resolve this conflict.

69 U.S.L.W. at 4453. By then holding that the exclusion of speech from a limited public forum "on the basis of the religious nature of the speech," *id.*, "constitutes impermissible viewpoint discrimination," *id.* at 4455, this Court resolved the conflict in the circuits *against* the decisions in *Gentala*, *Campbell*,[9] and *Bronx*.

Second, this Court in *Good News Club* cautioned that, while Establishment Clause concerns in theory may justify *content-*

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[9]Not surprisingly, a week later this Court granted review in *Campbell*, vacated the decision below, and remanded for further consideration in light of *Good News Club*. *See Campbell v. St. Tammany Parish School Board*, 69 U.S.L.W. 3778 (U.S. June 18, 2001) (No. 00-1194).

based restrictions on speech, it is unclear "whether a State's interest in avoiding an Establishment Clause violation would justify *viewpoint* discrimination." 69 U.S.L.W. at 4455 (emphasis added). *See also id.* at 4458. The Ninth Circuit, by contrast, mistakenly believed that this Court had already "indicated repeatedly" that an "Establishment Clause justification would suffice even if the exclusion is viewpoint discriminatory," 244 F.3d at 1073 & n.12.

Third, in *Good News Club* this Court held that a neutral policy of equal access is presumptively constitutional:

> [T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. . . . The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. *Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.*

69 U.S.L.W. at 4456 (citation omitted, emphasis added). The Ninth Circuit, by contrast, discounted the significance of neutrality, 244 F.3d at 1075-76, and gave no indication that respondent Tucson would need to wage an "uphill battle" to justify the discriminatory exclusion of religious speakers from its provision of free in-kind services.

Third, in *Good News Club* this Court recognized "the danger that [observers] would perceive a hostility toward the religious viewpoint if the [religious speaker] were excluded from the public forum." 69 U.S.L.W. at 4457. "Any bystander could

conceivably be aware of the [government's] use policy and its exclusion of the [religious speaker], and could suffer . . . from viewpoint discrimination," *id.* The Ninth Circuit gave no consideration whatsoever to these "countervailing concerns related to rights of other individuals in the community," *id.*

In sum, this Court's ruling in *Good News Club* mandates reversal of the Ninth Circuit's en banc decision in *Gentala*.

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT.

The Ninth Circuit has condoned the categorical, discriminatory exclusion of petitioners' intended event from a city program of in-kind services because of the event's religious message. The incompatibility of this ruling with the precedents of this Court could scarcely be clearer. The ruling below flies in the face of this Court's free speech, free exercise, and establishment jurisprudence.

A. The Free Speech Clause

The First Amendment protects religious speech, including prayer and worship. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, *we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.*

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination

against religious speech. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. *Good News Club*, 69 U.S.L.W. at 4454-55; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint"). Viewpoint-based discrimination -- an egregious form of content-based censorship, *Rosenberger*, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. *See Lamb's Chapel*, 508 U.S. at 390-92; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, no forum analysis is necessary to invalidate such censorship. *Lamb's Chapel*, 508 U.S. at 391-92.

In the present case, the respondent city excluded the petitioners' otherwise eligible expressive activities solely because the use would entail a forbidden perspective -- that of a believer supplicating God. This is unconstitutional viewpoint discrimination, yet the Ninth Circuit upheld the exclusion.

B. The Free Exercise Clause

The Free Exercise Clause forbids the discriminatory restriction of religious activities. Such a restriction targets speech or conduct *because it is religious* and thus strikes at the very heart of the constitutional protection of religious freedom. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> [T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993). *See also McDaniel v. Paty*, 435 U.S. 618 (1978).

In the present case, the city categorically excludes events with religious messages from its program of free in-kind services. The component activities -- gathering, singing, speaking, celebrating, and so forth -- are not otherwise objectionable uses. Just as in *Lukumi*, the government could not constitutionally forbid only *religious* slaughter of animals, so here the city cannot categorically disqualify only events with *religious* messages. Yet the Ninth Circuit condoned the city's targeted exclusion of religious speech.

The Ninth Circuit labeled petitioners' Free Exercise claim "weak" because the city had not imposed an "outright prohibition" of religious practice or denied services "essential to survival in a civil society," 244 F.3d at 1082. But as discussed above, this is *not* the test for reviewing *facially discriminatory* laws. Were the Ninth Circuit's miserly test correct, one would be hard pressed to challenge such plainly noxious laws as a ban on clergy attending Fourth of July events, or the categorical exclusion of church vehicles from HOV lanes.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers;

it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). *Accord Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory suppression of religious activities "would demonstrate not neutrality but hostility toward religion." *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990). *Accord Rosenberger*, 515 U.S. at 844-46; *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment).

Moreover, discriminatory suppression of religious speech requires the censor to judge what is and is not religious. This creates additional constitutional problems of "entanglement":

> [city officials] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted). *Accord Rosenberger*, 515 U.S. at 844-45. Thus, treating religious expression on equal terms with secular expression "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (emphasis in original; citation omitted).

Here the city discriminates against precisely those activities which it deems to have a "religious message," regardless of whether the intended use would otherwise be eligible for in-kind benefits. Petitioners' request, for example, was -- in secular terms -- to hold a meeting for purposes of discussion and petition regarding social, political, and educational matters.

The city categorically denied access to its program of in-kind services for this otherwise eligible use because the speech of participants would include a religious message. This is the antithesis of neutrality. Moreover, the policy at issue requires government officials to identify "religious" messages by private groups in order to enforce the policy of exclusion. Government agents are thus compelled to classify the activities of private citizens according to their perceived religiosity. Even if such a task were workable -- and it is not -- it would be a wholly improper role for a government censor. *Widmar*, 454 U.S. at 269 n.6, 272 n.11.

III. THE DECISION BELOW IS INDEFENSIBLE IN LIGHT OF *GOOD NEWS CLUB*, *ROSENBERGER*, AND OTHER DECISIONS OF THIS COURT.

The Ninth Circuit offered a potpourri of reasons for not following this Court's line of equal access cases in the present litigation. None of the lower court's proffered reasons, however, withstands scrutiny.

A. The Ninth Circuit's Specious Distinction of *Rosenberger*

After admitting that this Court's *Rosenberger* case was "quite similar to this one in many respects," 244 F.3d at 1074, the Ninth Circuit nevertheless attempted to identify reasons not to follow *Rosenberger*'s result. As demonstrated below, these purported distinctions are patently meritless.

1. Source of revenue

The Ninth Circuit noted that "the source of the Civic Events Fund moneys includes general tax revenue," 244 F.3d at 1078, unlike the student fees in *Rosenberger*. But this ought not to have altered the result.

First, none of the revenue in question here goes directly to any religious speaker; instead, the city provides only in-kind services. As in *Rosenberger*, "[w]e do not confront a case where . . . the government is making direct money payments to an institution or group that is engaged in religious activity," 515 U.S. at 842.

Second, *Rosenberger* distinguished "an expenditure from a general tax fund," *id.* at 841, on grounds equally applicable here -- namely, that the in-kind benefits drew upon "a special fund" set aside, not "for unlimited purposes," but for purposes of facilitating the expressive activities of private parties, *id.* As in *Rosenberger*, "[t]he error made by the Court of Appeals . . . lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient." *Id.* at 843.

Third, there is simply no support in this Court's precedents for holding that the Establishment Clause forbids a government from affording in-kind services on a religious-neutral basis, regardless of the source of funding for those services. "If the Establishment Clause barred extension of general benefits to religious groups, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-75.

2. Religious organizations

The Ninth Circuit noted that the sponsoring organizations here were religious in nature, 244 F.3d at 1078, while the student publication in *Rosenberger* was "not a religious institution" either in the "usual sense" or under the university's regulation, 515 U.S. at 819. But this was no more than an "additional reason," *id.*, for the *Rosenberger* Court, to distinguish the hypothetical case of a state paying a church's

bills, *id.* The *Rosenberger* Court pointedly noted that, "[e]ven assuming that [the student publication] is no different from a church and that its speech is the same as . . . religious exercises," *id.* at 842, there was no Establishment violation. Indeed, this Court has upheld the norm of equal access when the user was a church. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

3. Participatory religious service

The Ninth Circuit discerned significance in the fact that the evangelistic student magazine in *Rosenberger* did not "'*practice a devotion* to an acknowledged ultimate reality or deity,'" 244 F.3d at 1078 (quoting *Rosenberger*, 515 U.S. at 840) (emphasis added by Ninth Circuit). But the student group this Court held entitled to equal access in *Widmar* engaged in religious worship. 454 U.S. at 265 n.2. *Widmar* expressly rejected the contention that this fact could justify excluding the proposed use. *Id.* at 269 n.6. This Court's *Good News Club* decision likewise holds that a speaker enjoys the same equal access rights regardless of whether the intended speech can be labeled a religious service. 69 U.S.L.W. at 4455 & n.4.

4. Discretionary decisionmaking

The Ninth Circuit asserted that the city here has "considerably more discretionary decisionmaking [authority] than did the [*Rosenberger*] university's administration," 244 F.3d at 1079. As a factual matter, this is inaccurate. *Compare Rosenberger*, 515 U.S. at 825 (118 of 135 applicants received funding) *with Gentala*, 244 F.3d at 1069 (23 of 26 applicants received in-kind services). *Compare also Rosenberger*, 515 U.S. at 824 (open-ended criterion of "educational purpose" governing review of applications) *with* App. 165a-166a (Tucson Civic Event Fund guidelines). And as a legal matter,

the discretion in question is irrelevant. The existence of religion-*neutral* criteria for assessing applications cannot justify the addition of religiously *discriminatory* criteria. Even in the context of entirely discretionary government arts funding, for example, the categorical exclusion of art with a religious message would obviously trigger grave constitutional difficulties. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998). *A fortiori*, the categorical viewpoint-based exclusion of religious perspectives from a program, like the one here, designed "to encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, cannot find refuge in the existence of other, religion-neutral criteria for assessing applications for in-kind support.

5. Fundraising

The Ninth Circuit found significant the fact that the city's religious exclusion clause primarily operates to exclude fundraisers for religious organizations,[10] opining that in-kind support would indirectly allow event sponsors to devote "other, nonearmarked funds" raised at the event to their religious organization. 244 F.3d at 1079. But this is no more than a restatement of the long-discredited "free-up" argument:

> The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 658 (1980) (internal quotation marks and citations omitted); *see also id.* at 658 n.6 (citing additional authorities). Furthermore, concern about fundraising events is

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[10]Fundraisers for *nonreligious* beneficiaries, however, are eligible for in-kind services under the Civic Event Policy. App. 163a, 166a.

irrelevant on the facts here. The National Day of Prayer was not a fundraiser for the event sponsors; rather, the free will offering taken at the event, App. 139a, was to defray *the event itself*. *See* App. 142a (no money to go to any beneficiary); *id.* at 143a (any fund balance to be used for next year's event). Nor did the city deny the Gentalas' application because it was supposedly a fundraiser. Rather, the city objected to the *religious message* of the event. *Supra* pp. 7-8.

6. Visibility of city personnel and equipment

The Ninth Circuit found the "on-site, observable presence of city employees" and the use of city equipment "quite visible to onlookers," in contrast with the "behind-the-scenes payment of bills . . . in *Rosenberger*," to create a perception of impermissible city endorsement of religion. 244 F.3d at 1079. Reliance on these facts is truly mystifying, as the very same employees and equipment would be visibly present were the Gentalas to pay for such services, rather than receive a fee waiver. The issue is not the *presence* of city services, but rather the "behind-the-scenes payment" for them (or not).[11]

7. Encouragement as endorsement

The Ninth Circuit equated the city's *encouragement* of private events through the Civic Event Policy with *endorsement* of those events for Establishment Clause purposes. 244 F.3d at 1079-80. But the program in *Rosenberger* was likewise designed "to encourage private speech," 515 U.S. at 833; *id.* at

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[11]The Ninth Circuit in any event erred in finding legal significance in the "behind-the-scenes" nature of the payments in *Rosenberger*. Under the endorsement inquiry, the relevant observer is deemed aware of the pertinent facts, including those not immediately visible. *See Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment).

834. And as noted above, *supra* § III(A)(4), the discretion entailed in weighing applications for Civic Event support here, which the Ninth Circuit found pertinent to endorsement, 244 F.3d at 1079-80, does not distinguish *Rosenberger*.[12]

B. The Ninth Circuit's Other Reasons for Denying Equal Access

The Ninth Circuit added two final points in defense of the Tucson religious exclusion policy.

First, the court posited that "allowing various religious organizations to compete for funding" would tempt such organizations to "secularize" their events. 244 F.3d at 1080. The Ninth Circuit's reasoning is precisely backwards. It is the *exclusion* of religious viewpoints, not their *inclusion*, that pressures event sponsors to tone down their religiosity.

Second, the Ninth Circuit expressed fear that the city might tend to promote some religious messages over others. 244 F.3d at 1081. But the wholesale categorical exclusion of speakers with religious perspectives is hardly a satisfying response to this concern. Nor is this concern any less valid when the city is empowered to decide what is and is not "religious" for

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[12]The Ninth Circuit also pointed to the city's requirement that event sponsors publicly acknowledge in-kind support from the city. 244 F.3d at 1080. But for endorsement analysis, the relevant observer will already be deemed aware of that support. *Supra* note 11. And as the Ninth Circuit recognized, "[t]o require the City to hide its true relationship to the event would not alter that relationship," 244 F.3d at 1080. There is nothing unconstitutional about full public disclosure in this context.

The Ninth Circuit also relied upon the requirement that event organizers coordinate with a city official, *id.*, but this requirement applies regardless of whether the event receives in-kind support under the Civic Event Policy. *See* App. 137a. Hence, this detail is as irrelevant to the analysis as is the visible presence of city staff and equipment, *supra* § III(A)(6).

purposes of the exclusion. Moreover, this same amorphous concern could be raised whenever a neutral government program of in-kind benefits includes religious participants. This does not mean that the Establishment Clause requires the denial of equal access.

* * *

The Ninth Circuit's analysis consists of a cobbling together of factually irrelevant and legally inadequate excuses for categorically excluding religious speech from the provision of in-kind city benefits. Furthermore, the Ninth Circuit's flawed approach has caused a split in the circuits, as addressed below.

IV. THE DECISION BELOW CREATES A SPLIT IN THE CIRCUITS.

The decision of the Ninth Circuit conflicts with a decision of the District of Columbia Circuit likewise involving the government provision of free in-kind services to a religious event in a public park.[13]

In *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), the plaintiffs challenged, as a violation of the Establishment Clause, the federal government's provision of extensive in-kind services for a Catholic Mass to be celebrated by the Pope on the National Mall in Washington, D.C. The D.C. Circuit rejected the Establishment Clause claim. *Id.* at 934-37.

In *O'Hair*, the federal government provided considerable in-kind support:

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[13]In addition, as this Court expressly observed in *Good News Club*, the Ninth Circuit's decision in *Gentala* conflicts with several other circuits on "the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech." 69 U.S.L.W. at 4453. This conflict also warrants granting the present petition. *Id.*

> In connection with the outdoor Mass, the [government] is to provide Park Police services for crowd and traffic control, a chain link fence for crowd control, portable water fountains, and some electrical current. The estimated cost of the Park Police service is between $ 100,000 and $ 150,000 and an estimated additional $ 28,450 will be required for the other services.

Id. at 933 (footnote omitted). Government officials also engaged in extensive coordination with church representatives in anticipation of the event. *Id.* The court concluded that making such in-kind services available on a religion-neutral basis did not violate the Establishment Clause. *Id.* at 934-37.

In the present case, by contrast, the Ninth Circuit held that the Establishment Clause *prohibited* making in-kind services available on a religion-neutral basis for events in city parks.

V. THE DECISION BELOW CREATES A DEVICE FOR EVADING AND NULLIFYING THE EQUAL ACCESS RIGHTS OF RELIGIOUS SPEAKERS.

The Ninth Circuit has essentially devised a road map for evading and nullifying this Court's equal access precedents. Under the lower court's rationale, any government body wishing to discriminate against religious users need only: (1) impose user fees for overhead (facilities, lighting, climate control, maintenance), (2) waive those fees for virtually all other users, and (3) assert that the Establishment Clause forbids the waiver of those fees for religious users. By this simple bookkeeping expedient, a school district (as in *Good News Club* and *Lamb's Chapel*), university (as in *Rosenberger* and *Widmar*), or other government body (as in *Capitol Square*) could, if the Ninth Circuit's pernicious ruling were to stand, render nugatory the equal access norm.

CONCLUSION

This Court should grant the petition for certiorari and either summarily reverse the judgment of the Ninth Circuit, or else vacate the judgment below and remand for further consideration in light of *Good News Club*. In the alternative, this Court should grant plenary review.

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